U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF Z- INC.

DATE: JUNE 27, 2018

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a provider of software development services, seeks to employ the Beneficiary as a technical lead. It requests his classification under the second-preference, immigrant category as a member of the professions holding an advanced degree or its equivalent. Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This employment-based, "EB-2" category allows a U.S. business to sponsor a foreign national with a master's degree, or a bachelor's degree followed by five years of experience, for lawful permanent resident status.

The Director of the Nebraska Service Center denied the petition. The Director concluded that the accompanying certification from the U.S. Department of Labor (DOL) did not establish the offered position's need for an advanced degree professional.

On appeal, the Petitioner submits additional evidence and asserts that, consistent with the requested classification's criteria, the position requires a minimum of a bachelor's degree and five years of experience.

Upon *de novo* review, we will dismiss the appeal.

I. EMPLOYMENT-BASED IMMIGRATION

Employment-based immigration generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, an employer must first obtain DOL certification. *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for a position, and that employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

If the DOL certifies a position, an employer must next submit the certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS considers whether a beneficiary meets the minimum requirements of a certified position and whether a petitioner can pay a proffered wage. If USCIS approves a petition, a foreign national may finally apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

II. THE VALIDITY OF THE LABOR CERTIFICATION

Unless accompanied by an application for Schedule A designation or documentation of a beneficiary's qualifications for a shortage occupation, a petition for an advanced degree professional must include a valid, individual labor certification. 8 C.F.R. § 204.5(k)(4)(i). A certification with an EB-2 petition must "demonstrate that the job requires a professional holding an advanced degree or the equivalent." *Id.* The term "advanced degree" means "any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree." 8 C.F.R. § 204.5(k)(2).

To determine a position's minimum requirements, USCIS must examine the job offer portion of a labor certification. USCIS may neither ignore a certification term, nor impose additional requirements. *See, e.g., Madany v. Smith,* 696 F.2d 1008, 1015 (D.C. Cir. 1983) (holding that the "DOL bears the authority for setting the *content* of the labor certification") (emphasis in original).

Here, the labor certification states the primary requirements of the offered position of technical lead as a U.S. master's degree, or a foreign equivalent degree, and two years of experience. The certification also states the Petitioner's acceptance of an alternate combination of education and experience: a bachelor's degree and five years of experience.

Part H.14 of the labor certification further details the offered position's requirements. Part H.14 states: "Any suitable combination of education and experience is acceptable such as a Master's degree or foreign equivalent degree plus two years of experience OR a bachelor's degree or foreign equivalent degree plus five years of progressive experience." Referring to the Petitioner's acceptance of a foreign educational equivalent in part H.9, part H.14 also states: "Will accept foreign educational equivalency to a[] U.S. Master's degree or a[] U.S. Bachelor['s] degree as determined by a professional evaluation service."

Under 8 C.F.R. § 204.5(k)(2), the minimum educational requirement for an advanced degree professional is a bachelor's degree (followed by five years of experience). An EB-2 beneficiary must have the equivalent of a bachelor's degree based solely on a single degree that equates to a U.S. bachelor's degree. Addressing criticism that its proposed regulations would bar baccalaureate equivalencies based on combinations of educational and employment experience, or of lesser educational credentials, the former Immigration and Naturalization Service stated "both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*" Final Rule for Employment-Based Immigrant Petitions, 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (emphasis added); *see also* Proposed Rule for Employment-Based Immigrant Petitions, 56 Fed. Reg. 30703, 30706 (July 5, 1991) (stating that a "baccalaureate means a bachelor's degree received from a college or university, or an equivalent degree").

Contrary to EB-2 classification requirements, the plain language of part H.14 of the labor certification indicates the Petitioner's acceptance of less than a single degree equating to a U.S. bachelor's degree. Part H.14 states the Petitioner's acceptance of "*Any* suitable combination of education and experience such as a Master's degree or foreign equivalent degree plus two years of experience OR a bachelor's degree or foreign equivalent degree plus five years of progressive experience" (emphasis added). Also, the Petitioner's acceptance of a foreign degree equivalency "as determined by a professional evaluation service" suggests the suitability of a degree equivalency based on a combination of education and experience, or lesser educational credentials. *See Matter of Symbioun Techs., Inc.*, 2010-PER-01422, 2011 WL 5126284 (BALCA Oct. 24, 2011) (finding that a "comprehensive reading of all of Section H" of a labor certification clarified an employer's minimum job requirements). As such, the labor certification allows for less than a bachelor's degree and therefore does not support the requested EB-2 classification.

On appeal, the Petitioner maintains that it did not intend to accept a candidate with anything less than a bachelor's degree followed by five years of progressive experience for the offered position. Rather, the Petitioner asserts that it completed part H.14 of the labor certification to "further clarify" the job requirements of the offered position. The labor certification, however, already stated these requirements. The record does not establish a need for further clarification. Instead, by stating the Petitioner's acceptance of "Any" suitable combination of education and experience "such as" a master's degree and two years of experience or a bachelor's degree and five years of experience and acceptance of a degree equivalency "as determined by a professional evaluation service," part H.14 indicates that the Petitioner will accept combinations of education and experience beyond the specified primary and alternate requirement that are less than an advanced degree or its equivalent.

We note that the language of part H.14 resembles language required when a beneficiary works for a petitioner and qualifies for an offered position based solely on alternative requirements. *See* 20 C.F.R. § 656.17(h)(4)(ii); *Matter of Kellogg*, 94-INA-465, 1998 WL 1270641 *5 (BALCA Feb. 2, 1998) (*en banc*) (requiring a labor certification for such a beneficiary to indicate "that applicants with any suitable combination of education, training or experience are acceptable"). This required "*Kellogg* language" usually does not materially affect stated job requirements, as "the placement of the language on the application is simply a mechanism to reflect compliance with a substantive, underlying requirement of the [labor certification] program." DOL, Emp't & Training Admin., OFLC Frequently Asked Questions and Answers, Advertisement Content, Question 7, https://www.foreignlaborcert.doleta.gov/faqsanswers.cfm (last visited June 20, 2018). Here, however, part H.14 contains language beyond the required *Kellogg* language that modifies the minimum requirements and signals the employer's acceptance of less than an advanced degree.

As proof of its claimed acceptance of only an advanced degree, the Petitioner submits copies of its advertisements of the offered position during the labor certification process. The materials do not mention the Petitioner's acceptance of "Any suitable combination of education and experience" or a degree equivalency "as determined by a professional evaluation service." Rather, the materials state only the position's basic requirements of a master's degree and two years of experience, or a bachelor's degree and five years of experience.

USCIS regulations, however, require the *labor certification* to demonstrate the offered position's need for an advanced degree. 8 C.F.R. § 204.5(k)(4)(i) (stating that "[t]he job offer portion of the individual labor certification . . . must demonstrate that the job requires a professional holding an advanced degree or the equivalent"). Moreover, as the court in *SnapNames.com, Inc. v. Chertoff*, No. CV 06-65-MO, 2006 WL 3491005 *7 (D. Or. Nov. 30, 2006), recognized, where the plain language of the labor certification requirements does not support the petitioner's asserted intent, USCIS "does not err in applying the requirements as written." *Id.* The content of the Petitioner's advertising for the offered position therefore does not overcome the deficiencies with the labor certification.

For the foregoing reasons, the labor certification does not demonstrate the offered position's need for an advanced degree or its equivalent. The labor certification therefore does not support the requested classification.

III. ABILITY TO PAY THE PROFFERED WAGE

Although unaddressed by the Director, the record also does not establish the Petitioner's ability to pay the proffered wage. A petitioner must demonstrate its continuing ability to pay a proffered wage, from a petition's priority date until a beneficiary obtains lawful permanent residence.[1] 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*

Here, the labor certification states the proffered wage of the offered position of analyst as $106,000 a year. The Petitioner submitted copies of its federal income tax return for 2014. Contrary to 8 C.F.R. § 204.5(g)(2), however, the record lacks required evidence of the Petitioner's ability to pay the proffered wage in 2016, the year of the petition's priority date, or thereafter. For this additional reason, the petition may not be approved.

Also, USCIS records indicate the Petitioner's recent filings of multiple immigrant petitions for other beneficiaries. A petitioner must demonstrate its ability to pay the proffered wage of each petition it files until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). The Petitioner here must therefore demonstrate its ability to pay the combined proffered wages of petitions that were pending or approved as of, or filed after, this petition's priority date of April 25, 2016, until their beneficiaries obtained lawful permanent residence.[2] *See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (affirming our revocation of a petition's approval where, as of its grant, a petitioner did not demonstrate its ability to pay multiple beneficiaries).

[1] This petition's priority date is April 25, 2016, the date the DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

[2] The Petitioner need not demonstrate its ability to pay proffered wages of petitions that were denied, withdrawn, or revoked without a pending appeal or motion. It also need not demonstrate its ability to pay proffered wages before petitions' priority dates or after their beneficiaries obtained lawful permanent residence.

In any future filings in this matter, the Petitioner must provide required evidence of its ability to pay the proffered wage in 2016 and, if available, 2017. The Petitioner must also provide the proffered wages and priority dates of petitions that it filed, or that remained pending or approved, after April 25, 2016. The Petitioner should also submit proof of any wages it paid to corresponding beneficiaries after that date. The Petitioner may also provide additional evidence, including materials supporting the ability-to-pay factors stated in *Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

IV. CONCLUSION

The labor certification does not demonstrate the offered position's need for an advanced degree professional. Because the certification does not support the requested classification, we will affirm the petition's denial. The record also does not establish the Petitioner's ability to pay the proffered wage.

ORDER: The appeal is dismissed.

Cite as *Matter of Z- Inc.*, ID# 1323724 (AAO June 27, 2018)